International Brotherhood of Teamsters, Local 107 *and* Reber-Friel Company

Metropolitan Regional Council, United Brotherhood of Carpenters and Joiners of America *and* Reber-Friel Company

Laborers' International Union of North America, Local 332 *and* Reber-Friel Company. Cases 4–CD–1003–2, 4–CD–1007, and 4–CD–1015

September 28, 2001

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

The charges in this Section 10(k) proceeding were filed on June 24 and August 25, 1999, and January 18, 2000, by Reber-Friel Company (Reber-Friel or the Employer), alleging that the Respondents, International Brotherhood of Teamsters Local 107 (Teamsters); Metropolitan Regional Council, United Brotherhood of Carpenters and Joiners (Carpenters); and Laborers' International Union of North America, Local 332 (Laborers), respectively, each violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by one or both of the other unions. The hearing was held on April 19, 2000, before Hearing Officer Henry R. Protos.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Pennsylvania corporation, is a general services contractor in the trade show industry. During the 12 months preceding the hearing in this case, the Employer purchased and received goods valued in excess of $50,000 directly from suppliers located outside Pennsylvania. The parties have stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Teamsters, the Carpenters, and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer leases out, delivers, installs, and removes equipment and structural and other material components required for trade show exhibitions in the Philadelphia area. The Employer has a warehouse at its facility in the city of Philadelphia, but performs much of its work for conventions and trade shows at various locations in the city and in the surrounding suburban counties of Pennsylvania and New Jersey. Over a period of years before the dispute giving rise to this proceeding arose, the Employer entered into collective-bargaining agreements developed contractual relationships with the Teamsters and the Laborers, respectively, with respect to trade shows it serviced within the city of Philadelphia. The Employer obtained employees referred from each Union's hiring hall to perform transportation, loading, unloading, installation, and removal of its equipment and materials. For trade shows located in the suburban counties, however, with a few exceptions, the Employer used its own complement of approximately 28 warehouse employees. Before 1998, these employees were not represented by a union.

At all relevant times, the Employer's president, Thomas E. McAvinue, was also the head of an association of 13 trade show employers (including Reber-Friel), called the Philadelphia Exposition Show Contractors Association (PESCA). Until 1997, under individual agreements similar to Reber-Friel's, most of the other PESCA employers also used referrals from the Teamsters and the Laborers to service trade shows in the city of Philadelphia.

In May 1997, the Laborers sought to bring all the PESCA employers under a single multiemployer contract covering not only the city of Philadelphia but also the surrounding counties in Pennsylvania. McAvinue represented the PESCA members in the ensuing negotiations, assisted by Thomas McGarvey, the director of labor relations for one of PESCA's other members, GES Exposition Services. McGarvey had a professional background as an employer-side negotiator. On May 30, 1997, McAvinue signed a 3-year memorandum of understanding (MOU) with the Laborers on behalf of PESCA. By its terms, the MOU characterized itself as "modifications to the collective bargaining agreement" and (directly above McAvinue's signature) specified "5-County Territorial Jurisdiction." McGarvey drafted the MOU, inserting the boilerplate language he customarily used, which included a provision stating that the MOU was "contingent upon ratification by both parties." The Laborers completed their ratification procedure within a few days,

and no further issue was raised by any party concerning ratification for the following 2 years.

In April 1998, the Teamsters sought an agreement with PESCA similar to that of the Laborers. On April 10, after negotiations in which McGarvey again assisted McAvinue, McAvinue and McGarvey signed a 3-year MOU with the Teamsters, again on behalf of PESCA. The MOU with the Teamsters, also drafted primarily by McGarvey, stated that it covered "the Philadelphia 5-County Area—i.e.—Philadelphia, Montgomery, Bucks, Chester and Delaware and New Jersey—i.e.—Camden, Glouster [sic] and Burlington." Like the Laborers' MOU, the Teamsters' MOU contained McGarvey's provision requiring ratification by both parties. Like the Laborers, the Teamsters completed their ratification process within a few days, and no further issue was raised concerning ratification during the following year.

Although the record is not entirely clear, it appears that all the PESCA employers implemented the two MOUs after they were executed with respect to pay and other terms of employment for employees who were referred out of the respective hiring halls. The record is clear that Reber-Friel continued to employ referrals from the Teamsters and the Laborers at trade shows in the city of Philadelphia. However, despite the multicounty work jurisdiction specified in both MOUs and the related hiring hall provisions, Reber-Friel continued to use its warehouse employees to perform the work at nearly all of its shows in the suburban counties outside Philadelphia. Both unions complained about this to McAvinue with increasing vehemence.

During this same time period, on September 15, 1998, after a card check and verification of employee signatures by a neutral arbitrator, McAvinue signed a 4-year contract recognizing the Carpenters as the bargaining representative for Reber-Friel's warehouse employees. McAvinue signed this contract only on behalf of Reber-Friel, and did not inform the other PESCA employers of this development. Nor did he inform the Carpenters of his previous agreements with the Teamsters and the Laborers.

Reber-Friel continued to assign work in the suburban counties to the warehouse employees, and the Teamsters and the Laborers continued to complain that the Employer was not abiding by its agreements with them on work assignments outside Philadelphia. McAvinue testified that in May 1999 he took a ratification vote by mail among PESCA's members on the Teamsters' and the Laborers' MOUs. On or about May 19, 1999, McAvinue informed the Unions that both agreements had been rejected by PESCA's members and that they were consequently not in force. At the same time or shortly afterward, McAvinue revealed that Reber-Friel had a collective-bargaining agreement with the Carpenters covering its own employees.

Upon learning that McAvinue was raising an issue of ratification, McGarvey—who testified as a witness for the Teamsters—wrote a heated letter to McAvinue, dated June 9, 1999, pointing out that neither McAvinue nor any other PESCA employer had objected to the MOUs or raised a ratification problem after they were signed and put into place in 1997 and 1998. McGarvey asserted that the two MOUs were in force. At the hearing, moreover, McGarvey testified that PESCA had never had any "ratification" process and that, notwithstanding the boilerplate language he had used in drafting the MOUs, all the parties involved had understood, based on past practice, that the only "ratification" envisioned after the MOUs were signed was on the Unions' side.

At a meeting with McAvinue on June 24, 1999, the Teamsters representatives threatened to picket Reber-Friel if Teamster referrals were not assigned the Employer's work in the suburban counties. Reber-Friel then filed a charge against the Teamsters with the Board, alleging a violation of Section 8(b)(4)(D) of the Act. On July 26, 1999, both the Teamsters and the Laborers picketed the Employer at the Philadelphia Convention Center and refused to remove their pickets until McAvinue signed new printed versions of their respective MOUs later that day. On August 12, 1999, in response to these actions, the Carpenters sent a letter to the Employer in which it threatened to establish a picket line of its own if work performed by the Reber-Friel employees represented by them was reassigned to employees represented by the Teamsters. The Employer subsequently filed charges against the Carpenters and against the Laborers, in each case alleging violations of Section 8(b)(4)(D).

B. Work in Dispute

As noted above, the disputed work involves the setting up and dismantling of trade show exhibitions in the suburban counties surrounding Philadelphia.[1] The Employer's charge against the Teamsters defines the work in dispute as follows:

> Driving, loading, unloading, helping, forklift operating, freight delivery and checking for Reber-Friel Company on jobs or shows in Montgomery, Bucks, Chester and Delaware Counties in Pennsylvania and Camden, Gloucester and Burlington Counties in New Jersey.[2]

[1] The Employer does not dispute that employees represented by the Teamsters and the Laborers have performed and are still entitled to perform Reber-Friel's work at trade shows held in the city.

[2] The charge against the Carpenters defines the work in dispute in practically the same terms as does the charge against the Teamsters.

The Employer's charge against the Laborers defines the work in dispute in the following terms:

> The unloading and loading of freight, driving of fork lifts; unloading and loading all furniture; responsibility for maintenance of all "empties"; erection and dismantlement of all pipe; roll up all carpet; unloading and distribution of all printed material; and the movement of materials from the dock/bone yard to the work area for Reber-Friel Company on jobs or shows in Montgomery, Bucks, Chester and Delaware Counties in Pennsylvania.

Neither the charges nor the record enable us to distinguish the work jurisdiction asserted by the Teamsters from the work jurisdiction asserted by the Laborers. However, since the unlawful actions alleged did not pertain to any apparent dispute between the Teamsters and the Laborers, and in view of our disposition of this case, it is unnecessary for us to make such a determination.[3]

C. Contentions of the Parties

The Employer contends that the Teamsters and the Laborers violated Section 8(b)(4)(D) by engaging in threats to picket and in actual picketing of its operations for the explicit purpose of coercing the Employer to assign the work at issue to employees represented by them and referred from their hiring halls instead of to the Employer's warehouse employees. The Employer further contends that it is entitled and obligated to assign the work in dispute to its warehouse employees, represented by the Carpenters, pursuant to its contract with the Carpenters. According to the Employer, the contracts it executed with the Teamsters and the Laborers were never in force and established no basis for those Unions' claims to the work at issue, since neither contract was ratified pursuant to its own terms by PESCA's employer members. The Employer further asserts that with a few exceptions the Teamsters and the Laborers have never performed the work in dispute. Finally, the Employer contends that its warehouse employees, in addition to always having performed the work at issue, are the best qualified to perform it and are therefore entitled to retain it under the criteria the Board has established under Section 10(k) of the Act. The Carpenters, who now represent the warehouse employees, adopt the Employer's position.

The Teamsters and the Laborers contend that they performed the Employer's trade show work in the suburban counties even before they entered into their respective MOUs with PESCA described above. They further contend that the MOUs were ratified as required, were put into force, and are fully enforceable. According to the Teamsters and the Laborers, in essence, the MOUs confirmed that their respective work jurisdictions covered the work at issue. They argue further, in effect, that because both MOUs were executed at a time when the Carpenters did not represent the Employer's permanent employees and had no contractual or jurisdictional claim to the work in the suburban counties, the Employer's voluntary action in entering into the two MOUs confirmed or, at a minimum, established their respective jurisdictions over the disputed work. Consequently, they assert, this is not a dispute between unions over conflicting work jurisdictions, but a dispute between them and the Employer over work preservation for the employees they represent. Accordingly, under *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320 (1961), and its progeny, the actions the Teamsters and the Laborers took to protect their contractually established work jurisdiction did not violate Section 8(b)(4)(D) and do not fall within the scope of Section 10(k).

D. Applicability of the Statute

Before it may proceed with a determination of a dispute pursuant to Section 10(k), the Board must find reasonable cause to believe that the statute has been violated. *Laborers Local 320 (Northwest Metal Fab & Pipe)*, 318 NLRB 917, 918 (1995). It is uncontested that the Teamsters and the Laborers engaged in conduct with the object of forcing the Employer to assign the work at issue to employees represented by them and referred from their hiring halls, rather than to the Employer's warehouse employees represented by the Carpenters. In addition, the parties have stipulated that there is no agreed-upon method for resolving the dispute that would bind all parties. The only question is whether the Teamsters and the Laborers were attempting to protect contractually acquired work jurisdiction against an attempt by the Employer to reassign the work at issue within the meaning of *Safeway Stores*, above. Contrary to our dissenting colleague, we find that case inapplicable here.

Safeway Stores involved an attempt by the charging party employer to assign work previously performed by one union's members to other employees represented by another union in direct violation of the collective-bargaining agreement between the former union and the employer. The Board found that since the union's picketing activity was intended to protect its members from losing work they had already been performing pursuant to their contract, the union was not attempting to expand its work jurisdiction but was only enforcing its

[3] Similarly, although the Laborers apparently did not assert jurisdiction over work the Respondent performed in New Jersey, as did the Teamsters, the discrepancy is irrelevant in view of our disposition of the case.

its contract against a signatory employer. The Board found that the union's actions for such an object did not violate Section 8(b)(4)(D), and accordingly quashed the notice of hearing.

The Board has followed *Safeway Stores* in other cases where a union was attempting, in essence, to enforce a clear and indisputable contract claim to the work in dispute. E.g., *T Equipment Corp.*, 298 NLRB 937 (1990); *USCP-Wesco, Inc.*, 280 NLRB 818 (1986), affd. 827 F.2d 581 (9th Cir. 1987); *American Plant Protection*, 210 NLRB 574 (1974). In all such cases, however, the union's members had previously performed the work in dispute and the union was not attempting to expand its work jurisdiction. See also *Longshoremen ILWU Local 8 (Waterway Terminals Co.)*, 185 NLRB 186 (1970), remanded 467 F.2d 1011 (9th Cir. 1972), on remand 203 NLRB 861 (1973).[4]

In this case, the record does not bear out the Teamsters' and the Laborers' claims that their members performed the work at issue before the events giving rise to the charges. Apart from generalized assertions, the Teamsters and the Laborers were unable to specify more than a few isolated occasions when their members were employed by the Employer outside the city of Philadelphia, either before or after they executed their respective MOUs with PESCA.[5] The record supports the Employer's contention that, with these rare exceptions, it has always used its warehouse employees to perform work in the suburban counties. The Teamsters' and the Laborers' jurisdictional claims therefore rest entirely on the MOUs they executed with PESCA in, respectively, 1998 and 1997, and their corollary contentions that these agreements were thereafter implemented by all the PESCA employers.[6]

We recognize, like our dissenting colleague, that this case is atypical. While it is not uncommon for employees or their union representatives to assert work-preservation claims based solely on their previously having performed the work even without contractual entitlement, we are not aware of any case where work preservation claims were based entirely on a contractual claim without the employees' having previously performed the work. Nor are we aware of any case in which an employer who invoked the Board's procedures to resolve a work dispute has operated in quite the same manner that this employer has. However, even recognizing that a sequence of deliberate actions by the Employer created a contractual basis for the Teamsters and the Laborers to raise claims for the work at issue and led directly to this dispute, the pivotal fact remains that these Unions are claiming work for employees who have not previously performed it. The Teamsters' and Laborers' objective here was therefore not that of work preservation, but of work acquisition. In view of the competing claims on behalf of the employees who have in fact traditionally performed the work,[7] there are undisputedly two groups of employees claiming the work in dispute.

Moreover, the Teamsters and the Laborers could have pursued their contractual claims to the work at issue under Section 301 of the Act or under a grievance/arbitration procedure. However, they chose not to avail themselves of those noncoercive avenues of redress. Instead, they engaged in the coercive activity that resulted in the current proceeding.[8]

[4] In *Waterway Terminals*, in which the Board quashed a Sec. 10(k) notice of hearing, the union's members lost the work they had previously performed, due to a corporate acquisition which resulted in their own employer's losing the subcontract for the work to the acquiring corporation. 185 NLRB at 187–188.

[5] The Teamster witnesses alleged only two specific occasions—a show at "Ceasar's" in October 1997, and a show at the Cherry Hill Hilton in August 1998—when their members performed work for Reber-Friel outside Philadelphia. Similarly, the Laborers' witnesses alleged only five specific occasions when their members performed work for Reber-Friel in the outer counties, and four of those occasions occurred between 1980 and 1990. McAvinue recalled that the Teamsters performed work for Reber-Friel at the Marriott on City Line Avenue, which he said was only "technically" outside Philadelphia, before April 1998, and once later at the Pennsylvania Nurserymen's Show at Fort Washington Expo Center. In the absence of any indication that this work history amounted to more than random, isolated assignments, we find that it provides the Teamsters and the Laborers no basis to raise a valid work-preservation claim regarding work to be performed by Reber-Friel outside the city of Philadelphia.

[6] The Teamsters introduced an earlier contract it had negotiated with Reber-Friel, dated April 1, 1994, and titled "Pennsylvania Convention Center Agreement." The last page of this document was titled "Addendum to Phila. Pa. Convention Center and Philadelphia and Vicinity and 5 County Area and New Jersey Contracts." The addendum addressed the employment of stewards. We do not agree with the Teamsters that this addendum establishes contractual recognition of the Teamsters' work jurisdiction as extending outside the city of Philadelphia in 1994. Nor do we view the contractual documents that the Employer undisputedly signed under the duress of the Teamsters' and Laborers' picketing at the Philadelphia Convention Center on July 26, 1999, as voluntarily recognizing or establishing those unions' jurisdiction outside Philadelphia.

[7] A countervailing contractual claim to the work in dispute raised by the Carpenters indicates that the work assignment at issue is not readily amenable to a consistent resolution independent of this Sec. 10(k) proceeding. However, our conclusion that there are two competing groups of employees in this case does not depend on whether the employees who have historically performed the work are represented by another union or whether another bargaining agreement covering these employees exists.

[8] The work award in this proceeding does not necessarily preclude the Teamsters and the Laborers from seeking noncoercive means for redress of their alleged contractual claims that does not conflict with

For these reasons, we conclude this is a matter fully appropriate for resolution under a Section 10(k) proceeding. We further find from the record that there is probable cause to believe the Teamsters and the Laborers acted unlawfully in attempting to coerce the Employer to assign the work in dispute to employees whom they represent.[9]

In so finding, we emphasize that we do not condone what the Employer has done. Indeed, if the rules of decision established under Sections 8(b)(4)(D) and 10(k) based the outcome solely on the Employer's own conduct, we might have agreed with our dissenting colleague. However, the Act's requirements and our own established criteria compel us to find a probable violation.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of any Board certification concerning the employees involved in this dispute. However, the Employer presented unrebutted evidence that it recognized the Carpenters as the representative of its warehouse employees and entered into a collective-bargaining agreement with the Carpenters on the basis of a card check, which was certified as legitimate by a neutral arbitrator. The Teamsters' and the Laborers' MOUs with PESCA extended these Unions' geographic coverage to include the territory served by the Employer's warehouse employees. The terms of all three collective-bargaining agreements are not entirely explicit with respect to the nature of the work covered, but the parties do not dispute that all three contracts were intended to cover work of the type here at issue.

Accordingly, we find that the factor of certifications and collective-bargaining agreements does not favor awarding the work in dispute to employees represented by any of the Unions.

2. Employer preference and current assignment

There is no dispute that the work in dispute is currently being performed by the Employer's warehouse employees represented by the Carpenters; or that the Employer, notwithstanding the respective 1997 and 1998 MOUs with the Teamsters and the Laborers into which it entered through PESCA, prefers to assign the work in dispute to these employees. Accordingly, we find that this factor favors awarding the work in dispute to the employees represented by the Carpenters.

3. Employer past practice

As found above, with a few isolated exceptions, the Employer has always used its own employees to perform trade show work in the suburban counties surrounding Philadelphia. Accordingly, we find that this factor favors awarding the work in dispute to the employees represented by the Carpenters.

4. Area and industry practice

Again, as found above, with a few exceptions, the Employer has always used its own employees to perform trade show work in the suburban counties around Philadelphia. On the other hand, the record indicates that after the Teamsters and the Laborers entered into their respective MOUs with PESCA, at least some PESCA employers other than Reber-Friel used employees referred from the Teamsters' and the Laborers' hiring halls to perform trade show work in the suburban counties. The record does not clearly indicate how many trade show contractors operated in the Philadelphia area without being members of PESCA; nor is there any additional evidence in the record to establish clearly the industry practice with respect to work assignment in the suburban counties. Accordingly, we find that the factor of industry practice does not favor awarding the work in dispute to employees represented by any of the Unions.

5. Relative skills and training

There is no dispute that the Employer's warehouse employees, represented by the Carpenters, are employed on a permanent full-time basis, in contrast to employees who are referred from the Teamsters' and the Laborers' hiring halls on a project-by-project basis. The Employer's president, McAvinue, testified without contradiction that Reber-Friel's warehouse employees have had

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the present award. See *Carpenters Local 33 (GC of Massachusetts)*, 289 NLRB 1482 (1988), and *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787, 789 (1990).

[9] Although the Carpenters may have a well-founded work-preservation claim based on their represented employees' having historically performed the work in dispute, we find it unnecessary to quash the proceeding with respect to the charge against that Union, particularly in the absence of such a request and in view of our dismissal of that charge, explained below. Accordingly, we also find, as a technical matter, that there is probably cause to believe that the Carpenters acted unlawfully in attempting to coerce the Employer in regard to the assignment of the work in dispute.

more experience and have received particularized cross-training in the various tasks involved in servicing trade shows. This superior experience and training, according to the Employer, has given these employees a broader range of applicable skills and a higher degree of productivity than employees intermittently referred from the Teamsters' and Laborers' hiring halls possess. There is no other evidence in the record bearing on the relative skills or productivity of employees represented by the Carpenters, Teamsters, and Laborers.

Accordingly, we find that this factor favors awarding the work in dispute to the employees represented by the Carpenters.

6. Economy and efficiency of operations

The Employer's president, McAvinue, also testified without contradiction that because its warehouse employees are more skilled and productive than employees intermittently referred from the Teamsters' and Laborers' hiring halls, it is able to perform trade show operations in the suburban counties with fewer employees, and on a more economical basis, if it uses those employees. McAvinue also testified that Reber-Friel's agreements with the Teamsters and the Laborers do not permit employees referred from each union's hiring hall to perform work in the other's jurisdiction. This restriction, according to the Employer, results in a need to hire more employees than would otherwise be necessary. There is no other evidence in the record bearing on the comparable efficiency of operation or economy resulting from the Employer's using its own employees as opposed to referrals from the Teamsters and the Laborers.

Accordingly, we find that this factor favors awarding the work in dispute to the employees represented by the Carpenters.

Conclusions

After considering all the relevant factors, we conclude that the employees represented by the Carpenters are entitled to perform the work in dispute. We reach this conclusion on the basis of employer preference and current assignment, employer past practice, relative skills, and economy and efficiency of operations. In making this determination, we are awarding the work in dispute to the Employer's warehouse employees represented by the Carpenters, not to that Union or its members.[10] This determination is limited to the controversy that gave rise to this proceeding. Because the work at issue is performed on a multisite basis, our determination applies to all similar disputes concerning work performed in the Pennsylvania and New Jersey counties surrounding Philadelphia. *Standard Sign & Signal Co.*, 248 NLRB 1144 (1980).

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Reber-Friel Company, represented by Metropolitan Regional Council, United Brotherhood of Carpenters and Joiners, are entitled to perform the work of driving, unloading, loading, and checking of freight, helping, driving of fork lifts; unloading and loading all furniture; responsibility for maintenance of all "empties"; erection and dismantlement of all pipe; roll up all carpet; unloading and distribution of all printed material; and the movement of materials from the dock/bone yard to the work area for Reber-Friel in the counties surrounding the city of Philadelphia, Pennsylvania.

2. International Brotherhood of Teamsters Local 107 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Reber-Friel Company to assign the disputed work described above to employees represented by it.

3. Laborers' International Union of North America, Local 332 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Reber-Friel Company to assign the disputed work described above to employees represented by it.

4. Within 14 days from this date, International Brotherhood of Teamsters Local 107 and Laborers' International Union of North America, Local 332 shall each notify the Regional Director for Region 4 in writing whether it will refrain from forcing Reber-Friel Company, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. September 28, 2001

Peter J. Hurtgen, Chairman

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

This record, in my view, does not entitle the Employer to relief under Section 10(k). Congress surely did not intend to require the Board to protect an employer who foments a dispute by knowingly giving the respondent

[10] In view of this determination, we will dismiss the charge against the Carpenters.

unions an unambiguous contractual basis for claiming the work at issue.

As set out in the majority's decision, Reber-Friel's president, after negotiation with the Laborers, agreed in writing to hire referrals from the Laborers in an explicit "5-County Territorial Jurisdiction." A year later, the same individual signed a similar contract with the Teamsters agreeing to hire referrals from the Teamsters in "the Philadelphia 5-County Area—i.e.—Philadelphia, Montgomery, Bucks, Chester and Delaware and new Jersey—i.e.—Camden, Glouster [sic] and Burlington." Reber-Friel's president made these agreements on behalf not only of Reber-Friel, but also of all the employers in PESCA, as part of a multiemployer bargaining relationship. The Employer does not seriously dispute that both agreements were promptly implemented in almost all respects; and neither Reber-Friel nor any other PESCA employer raised any question concerning ratification at the time either agreement was signed.

However, Reber-Friel immediately reneged on both agreements' multicounty hiring requirements; arranged to recognize a third union in a contract directly conflicting with the two it had already signed; kept the third agreement secret not only from the Teamsters and the Laborers but from the other PESCA employers; and then, *1 year* after the Teamsters' agreement and *2 years* after the Laborers' agreement were respectively signed, took the position that both agreements had not been properly ratified and were not in effect. PESCA's own chief negotiator wrote at the time, and testified in this proceeding, that this conduct was reprehensible.

This case is an anomaly. The material facts do not neatly fit the profile of a union's lawful use of self-help to preserve its members' work jurisdiction, which we have recognized as an exception to the prohibition in Section 8(b)(4)(D).[1] On one hand, the Teamsters and the Laborers undisputedly used coercive means to obtain work that their members had not previously performed to any significant extent.[2] On the other hand, the Unions' attempts to expand their work jurisdiction were made initially through written agreements with the Employer. The Employer freely chose to give both Unions a substantial, if not conclusive, contractual basis for claiming the work in dispute. These contractual claims were not a mere byproduct of ambiguous language. They were based on a clearly stated intent to expand the geographical scope of the existing units. True, the Teamsters and the Laborers could have pursued their contractual claims in a more appropriate forum and chose not to do so. Nevertheless, the Board's processes should not be made available to shield the Employer from the consequences of its own, dubious actions.

In *Safeway Stores*, *Waterway Terminals*, and similar cases, the Board recognized that a union's coercive action in seeking to recover work formerly performed by employees it represents technically falls within the zone of conduct prohibited by Section 8(b)(4)(D). In those cases, however, the Board found that overriding considerations made the dispute inappropriate for resolution by a work award under Section 10(k), and justified quashing the notice of hearing.[3] Many of these cases emphasize that Section 8(b)(4)(D) was intended to protect employers from being caught in the middle of jurisdictional disputes they had little or no role in creating, but not to provide a shield for employers who by their own deliberate actions create such disputes. In particular, in *Teamsters Local 578 (USCP-Wesco, Inc.)*, 280 NLRB 818, 820 (1986), affd. 827 F.2d 581 (9th Cir. 1987), the Board recognized that it "should look to the real nature and origin of the dispute in deciding whether it is actually jurisdictional." The Board found that the employer, Safeway, was

> not the "innocent" employer that Section 10(k) was intended to protect. . . . Safeway voluntarily entered into an agreement with [the respondent union], which included restrictions on subcontracting unit work. Shortly thereafter it nevertheless decided to subcontract work [elsewhere]. Safeway should not now be allowed to use the Board's 10(k) processes to avoid its contractual obligations.

Id. at 823. Accord: *Safeway Stores*, 134 NLRB 1323 ("the normal situation demonstrates how far removed is the instant case where the employer by his unilateral action created the dispute, by transferring work away from the only group claiming the work").[4]

[1] See *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320, 1322 (1961), and *Longshoremen ILWU Local 8 (Waterway Terminals Co.)*, 185 NLRB 186 (1970), remanded 467 F.2d 1011 (9th Cir. 1972), on remand 203 NLRB 861 (1973).

[2] I note, however, that if Reber-Friel had abided—even briefly—by the two agreements' jurisdictional requirements at the outset, the Teamsters and the Laborers would have had an actual history of performing the work in dispute, which is often a dispositive factor in jurisdictional dispute cases. In effect, the majority's decision rewards the Employer for *never* having complied with its contractual obligations concerning assignment of the work at issue.

[3] In *NLRB v. Electrical Workers IBEW Local 1212*, 364 U.S. 573 (1961), the Supreme Court indicated approval of the Board's position that "jurisdictional strikes in support of contract rights do not constitute violations of Sec. 8(b)(4)(D) despite the fact that the language of that section contains no provision for special treatment of such strikes." 364 U.S. at 577 fn. 12.

[4] See also *Longshoremen ILWU Local 62-B v. NLRB*, 781 F.2d 919 (D.C. Cir. 1986), in which the court denied enforcement of an order in which the Board found an 8(b)(4)(D) violation, noting that "[t]he dis-

It is true that Sections 8(b)(4)(D) and 10(k) protect not only "innocent-victim" employers but also "interested" employers who favor a particular union. E.g., *NLRB v. Plasterers Local 79*, 404 U.S. 116 (1971). However, the interested employers we have protected have been employers who through inadvertence, incompetence, bona fide changes of operation, mergers or acquisitions, contract ambiguities, or other circumstances beyond their control came under arguable obligation to more than one union for the same work. Neither the Supreme Court nor the Board has ever held that Sections 8(b)(4)(D) and 10(k) should protect an employer who knowingly creates and immediately disregards explicit contractual obligations. As stated in *USCP-Wesco*, we have always retained the discretion to decide that an employer, by his own conduct, has forfeited such protection. This discretion derives not only from our interpretation of the Act, but also from the prudential concern of conserving the Board's scarce resources.

In applying Sections 8(b)(4)(D) and 10(k), we have also stressed the importance of fostering the collective-bargaining process. Our policy has always been to respect the mutual accommodations employers and labor organizations reach concerning terms and conditions of employment, as long as those accommodations do not prejudice the rights of employees and employers under the Act. As we stated in *USCP-Wesco*,

> [f]inding a jurisdictional dispute every time an employer allegedly breaches a no-subcontracting clause would not promote the private settlement of such disputes through the collective-bargaining process. To hold that this dispute is a jurisdictional dispute to be decided by the Board would not allow the [respondent union] employees the benefit of their negotiated work preservation clause.

280 NLRB at 821. See also *Columbia Broadcasting*, 364 U.S. at 577.[5] Even in cases where the Board's primary emphasis was on the fact that the respondent union was attempting to regain work that its members had already been performing, the Board has also emphasized the importance of protecting the union's contractual rights.[6] To the extent that we permit unions or employers to make light of their agreements, we undermine the Act's objectives of promoting stability of bargaining relationships and reducing disruption of commerce.

In light of these principles, "the real nature and origin of this dispute" remove this Employer from the universe of employers whom Sections 8(b)(4)(D) and 10(k) are intended to protect. The Employer, "by his unilateral action created the dispute," and in consequence of his own actions has forfeited his right to such protection. Accordingly, I dissent.

Dated, Washington, D.C. September 28, 2001

Wilma B. Liebman, Member

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pute was entirely of the employer's making." 981 F.2d at 925. The court also noted that the employer's reassignment of the work in dispute to its own employees "does not establish that a jurisdictional dispute existed. Were that the rule, an employer could always create a jurisdictional dispute between employee groups by reassigning work." Id. The court found that "[w]here, as here, the employer created the dispute, Secs. 8(b)(4)(D) and 10(k) do not apply." Id. In the court's view, "[t]he central problem these provisions aim to solve embodies two characteristics; *first*, the employer faces a jurisdictional dispute *that is not of his own making* and in which he has no interest; second, the dispute is between two employee groups." Id. at 924 (emphasis added). The court also emphasized that "the Labor Board must decide whether cases that do not precisely fit the model of a jurisdictional dispute outlined above are nevertheless sufficiently like that two-part model to warrant intervention by the Board." Id.

[5] "To fail to hold as controlling . . . the contractual preemption of the work in dispute would be to encourage disregard for observance of binding obligations under collective-bargaining agreements and invite the very jurisdictional disputes Section 8(b)(4)(D) is intended to prevent." 364 U.S. at 577 fn. 12, quoting *Nat. Ass. of Engineers*, 105 NLRB 355, 364 (1953).

[6] E.g., *Electrical Workers Local 103 (Buffalo Electric Constr.)*, 298 NLRB 937 (1990); *USCP-Wesco*, supra; *Safeway Stores*, supra; *NABET (NBC)*, 105 NLRB 355, 364 (1953). Typically, where we find an 8(b)(4)(D) violation, the respondent union's contractual claim (if any) is not strong enough to be dispositive.